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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

KPI ULTRASOUND, INC.,

Cross-complainant and Appellant,

v.

3 DAY BLINDS, INC.,

Cross-defendant and Respondent.

E038652

(Super.Ct.No. RIC387597)

OPINION

APPEAL from the Superior Court of Riverside County. Dallas Holmes, Judge.

Affirmed.

Reid & Hellyer, David G. Moore, and Michael G. Kerbs, for Cross-complainant and Appellant.

Bragg & Kuluva and Kenyon M. Young, for Cross-defendant and Respondent.

1. Introduction

Cross-complainant and appellant KPI Ultrasound, Inc. (KPI) appeals after the trial court granted summary judgment in favor of cross-defendant and respondent 3 Day

Blinds, Inc. (3 Day Blinds) on KPI's cross-complaint for indemnity on an underlying tort claim. We affirm the judgment.

2. Factual and Procedural Background

The underlying facts are essentially undisputed. KPI contracted with 3 Day Blinds to install some blinds at its new office building. The only party with whom KPI had contact was 3 Day Blinds. KPI paid in advance for the blinds and installation. An employee of 3 Day Blinds measured the windows, and assured KPI that 3 Day Blinds would take care of the installation. In fact, 3 Day Blinds hired a two-brother team of independent contractors, Richard D. Bockman and Jeff Bockman, to install the blinds.

The Bockmans installed most of the blinds, but they did not have the proper equipment to reach one of the windows. KPI called 3 Day Blinds to complete the job. In turn, 3 Day Blinds had called Jeff Bockman to finish the installation, but he stated that he was unable to complete the job because the window was too high. Richard D. Bockman stated, however, that they had a scaffold they could use. Both Bockmans stated that they felt pressured by 3 Day Blinds to finish the installation, even though they did not have the proper equipment.

On September 10, 2002, about one month after the first installation, the Bockmans returned to KPI's premises to finish the job. Richard Bockman placed a ladder on top of a scaffold to reach the window. Richard Bockman fell approximately 30 feet from the top of the ladder and was severely injured. Richard Bockman filed an action against KPI, 3 Day Blinds, and his brother Jeff Bockman.

KPI cross-complained against 3 Day Blinds for implied indemnity and declaratory relief. 3 Day Blinds filed an answer, claiming that it had no duty to indemnify KPI.

KPI moved for summary judgment against plaintiff Richard Bockman on the complaint. The trial court granted the motion, determining that KPI was without fault for Bockman's injuries. At the time the trial court granted summary judgment for KPI, KPI had incurred \$21,550.48 in attorney fees and costs. KPI then made a formal demand to 3 Day Blinds for reimbursement of these expenses.

Some time later, 3 Day Blinds gave notice that it had settled the underlying complaint with plaintiff Richard Bockman for \$5,000. The trial court found that KPI's cross-complaint could not be disposed of by a determination of good faith settlement with Richard Bockman.

Thereafter, 3 Day Blinds filed a motion for summary judgment on KPI's cross-complaint; 3 Day Blinds contended that KPI could not recover on its claim for indemnity because it allegedly failed to tender the defense of the case to 3 Day Blinds.

The trial court granted 3 Day Blinds's motion for summary judgment, and gave judgment against KPI on its claim for indemnity. KPI appeals.

1. Analysis

A. Standard of Review

“On review of a summary judgment, we ‘examine the record de novo and independently determine whether [the] decision is correct. [Citation.]’ [Citation.] In undertaking our independent review of the evidence submitted, we apply “the same three-step process required of the trial court: First, we identify the issues raised by the

pleadings, since it is these allegations to which the motion must respond; secondly, we determine whether the moving party's showing has established facts which negate the opponent's claims and justify a judgment in movant's favor; when a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.

[Citations.]” [Citation.]” (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 392.)

Our review is de novo in this instance for the additional reason that the summary judgment presented no issues of fact, but only an issue of law: did KPI state a valid indemnity claim; i.e., was Code of Civil Procedure¹ section 1021.6 applicable? (See *Uniroyal Chemical Co. v. American Vanguard Corp.* (1988) 203 Cal.App.3d 285, 292.)

2. Step One – Issues Tendered by the Pleadings

KPI's first amended cross-complaint alleged causes of action against Jeff Bockman (dba Bockman Window Covering Installations) and 3 Day Blinds for equitable indemnity and contribution, and declaratory relief. It incorporated by reference the causes of action of the complaint.

The complaint asserted a cause of action against KPI for premises liability. Plaintiff Richard Bockman alleged that he was working at KPI's premises when KPI “required, demanded, ordered, [and] directed Plaintiff to install blinds at a height which was not originally agreed to between the parties.” Plaintiff alleged that KPI had caused

¹ All further statutory references will be to the Code of Civil Procedure unless otherwise indicated.

the faulty scaffolding to be erected, knowing that it was dangerous, as well as contrary to the purchase and installation contract for the blinds.

KPI's cross-complaint claimed that Bockman and 3 Day Blinds were "culpable and at fault and negligent in proximately contributing to the happening of the accident" referred to in Richard Bockman's complaint. KPI alleged that, "[i]n the event that [KPI] is held liable to plaintiff . . . [KPI] will be entitled to an allocation of liability among, contribution from, or indemnity from one or more of the cross-defendants"

KPI further alleged that a "dispute has arisen and an actual controversy exists between [KPI] and cross-defendants in that [KPI] claims that it is entitled to indemnification, contribution and allocation of liability and negligence . . . whereas cross-defendants contend they have no such duty."

The cross-complaint did not plead the provisions of the contract with 3 Day Blinds; it therefore made no claim for express contractual indemnity. Nonetheless, KPI asserts here that plaintiff's theory of liability against KPI for his injuries was predicated upon the contract, i.e., that the window on which he was installing the blinds was either not included in the contract, or was, because of its height, beyond the terms agreed to in the contract. The only reason KPI could have had any liability at all was because of the preexisting contract between itself and 3 Day Blinds.

3. Step Two – 3 Day Blinds Showed It Was Entitled to Judgment

In moving for summary judgment, 3 Day Blinds argued that KPI failed to demonstrate any legal basis for a claim of implied indemnity.

As 3 Day Blinds noted in its moving papers, the basic rule is that each party bears its own attorney fees, unless provided otherwise by contract or by statute. (§ 1021.)

In opposing 3 Day Blinds's motion for approval of a good faith settlement with plaintiff, KPI predicated its claim for attorney fees on section 1021.6.

Section 1021.6 provides: "Upon motion, a court after reviewing the evidence in the principal case may award attorney's fees to a person who prevails on a claim for implied indemnity if the court finds (a) that the indemnitee through the tort of the indemnitor has been required to act in the protection of the indemnitee's interest by bringing an action against or defending an action by a third person and (b) if that indemnitor was properly notified of the demand to bring the action or provide the defense and did not avail itself of the opportunity to do so, and (c) that the trier of fact determined that the indemnitee was without fault in the principal case which is the basis for the action in indemnity or that the indemnitee had a final judgment entered in his or her favor granting a summary judgment, a nonsuit, or a directed verdict."

"Section 1021.6 does not provide a way around the American rule that each party to a lawsuit must pay his or her own attorney's fees in the commonplace case of a multiparty tort action." (*Watson v. Department of Transportation* (1998) 68 Cal.App.4th 885, 888 (*Watson*).) Thus, "Section 1021.6 does not establish the criteria for an implied indemnity. It presupposes the existence of 'a claim for implied indemnity' on which the party seeking attorney's fees has prevailed. For this reason a claim for implied indemnity must be established under the existing law of indemnity." (*Id.* at p. 890.)

As in *Watson*, 3 Day Blinds here argues that KPI had failed to establish any such basis for an implied indemnity claim: 3 Day Blinds “argues that on the facts in this case there was no relationship between itself and [KPI] giving rise to indemnity under the established categories of implied indemnity, e.g., implied contractual indemnity, vicarious liability, or an intentional tort giving rise to complete equitable indemnity.” (*Watson, supra*, 68 Cal.App.4th at pp. 890-891.)

KPI did not plead a contract and failed to allege a contractual basis for indemnity. KPI was not alleged to be vicariously liable for 3 Day Blinds’s alleged liability in the main action. Nor did the main action involve any intentional tort.

“The only other conceivable theory of indemnity is partial indemnity from other concurrent tortfeasors under *American Motorcycle Assn. v. Superior Court* [(1978)] 20 Cal.3d 578.” (*Watson, supra*, 68 Cal.App.4th at p. 891.) Here, as in *Watson*, however, “that theory is inapplicable because [KPI] was found not to have been a concurrent tortfeasor, and if [it] had been such a tortfeasor, [it] could not have recovered under section 1021.6 because subdivision (c) requires an absence of fault.” (*Ibid.*)

KPI successfully moved for summary judgment on the underlying complaint, and its motion was granted based on its showing that it was not a tortfeasor and had nothing to do with plaintiff Richard Bockman’s injuries. Under such circumstances, section 1021.6, is simply inapplicable. (*Watson, supra*, 68 Cal.App.4th at p. 891.)

Assuming that KPI had stated a claim for implied indemnity, 3 Day Blinds further argued that KPI failed to meet all the requirements of section 1021.6. In particular, 3 Day Blinds argued that KPI failed to meet the second of the three prongs required under

the statute. Section 1021.6 requires first, that the indemnitee be required to act in its own protection by defending the main action brought by the plaintiff. Second, the indemnitee must notify the indemnitor of the action and make a demand for indemnity, or tender defense of the action to the indemnitor. Third, the trier of fact must have found that the indemnitee was without fault in the principal case. (§ 1021.6; *Uniroyal Chemical Co. v. American Vanguard Corp.*, *supra*, 203 Cal.App.3d 285, 293-294.)

In its moving papers, 3 Day Blinds asserted that KPI had never tendered the defense of the action to it.

The showing of 3 Day Blinds was sufficient to establish a right to judgment in its favor.

4. Step Three – KPI Failed to Defeat 3 Day Blinds’s

Motion for Summary Judgment

KPI opposed the motion below on the theory that it had complied with the demand prong of section 1021.6. It argued that its cross-complaint itself constituted such a demand. It also pointed to a demand letter it had sent to 3 Day Blinds dated December 5, 2003, *after* the trial court had orally granted KPI’s motion for summary judgment against Richard Bockman in the main action. Formal judgment was entered on or about February 25, 2004.

KPI’s demand letter was clearly untimely. (Cf. *John Hancock Mutual Life Ins. Co. v. Setser* (1996) 42 Cal.App.4th 1524, 1526, fn. 4.) The point of requiring a demand and tender of defense is to avoid the necessity of the indemnitee’s incurrence of its own attorney fees for a separate defense. It is only when such a demand has been made and

refused that the claim for indemnity of the attorney fees can arise. By the time KPI issued its demand letter, it had already separately defended the Bockman action, via its answer and motion for summary judgment.

KPI's claim that its cross-complaint constitutes a proper demand and tender of defense is untenable. The cross-complaint is a pleading alleging the existence of a cause of action. In other words, it asserts the basis of liability for indemnity. The pleading here did not, in its import, tender defense of the main action to 3 Day Blinds. Rather, it pleaded or attempted to plead a basis for indemnity liability, assuming that KPI's underlying tort liability was established in the main action.

KPI asserts on appeal that its cross-complaint also included a claim for attorney fees under the "tort of another" doctrine. This claim is unavailing. Section 1021.6 codifies the liability to indemnify for attorney fees under the "tort of another" doctrine. (*Burger v. Kuimelis* (N.D. Cal. 2004) 325 F.Supp.2d 1026.) KPI's failure to meet the second prong of the statute also defeats its claim under the "tort of another" theory.

5. Disposition

The trial court properly granted summary judgment for 3 Day Blinds on the cross-complaint; the judgment is affirmed. Respondent is to recover its costs on appeal.

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/s/ GAUT
J.

We concur:

/s/ McKINSTER
Acting P. J.

/s/ RICHLI
J.